

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	EB Docket No. 03-198
Section 272(d) Biennial Audit of Qwest)	
Communications International, Inc.)	
)	

**COMMENTS OF AT&T CORP. ON QWEST'S SECTION 272
COMPLIANCE BIENNIAL AUDIT REPORT**

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August 30, 2004

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Pursuant to the Commission's Public Notice in the above-entitled matter,¹ AT&T Corp. ("AT&T") hereby submits its Comments on the Report of Ernst & Young LLP (the "Auditor"), filed on June 10, 2004 in connection with the biennial section 272 audit of the Qwest companies ("Auditor's Report").

INTRODUCTION AND SUMMARY

The Audit Report identifies several violations of section 272. First, despite the significant deficiencies in the performance metrics used that mask discriminatory conduct, and despite Qwest's failure to report performance data for ten of the twelve months of the engagement period and, at times, deficiencies in its reporting or calculation of parity, the Audit Report shows that Qwest favored its affiliates over those affiliates' competitors. Second, the Audit Report demonstrates that over forty percent of Qwest's affiliate agreements were not timely posted on its website, the delays in many cases being years, not

¹ See Public Notice, *Qwest Communications International, Inc. Section 272 Biennial Audit Report*, EB Docket 03-198, (June 29, 2004).

months. The most benign explanation for this systemic failure timely to post affiliate agreements on its website is the utter absence of effective internal controls – training, monitoring and discipline were concededly inadequate. Third, the Audit Report shows that Qwest steered customers to its long distance service due again, to inadequate internal controls. Finally, there appears to have been a preferential transfer of a switch by the Qwest BOC to its section 272 affiliate, Qwest Communications Corporation (“QCC”), as well as preferential rates charged for various services and for leased space.

The Audit Report also fails to provide sufficient information to adequately determine whether Qwest has violated its other section 272 obligations, and if so, the extent of such violations. Thus, Qwest’s ongoing accounting problems make it impossible to determine whether assets were jointly owned by the BOC and its section 272 affiliate and whether the “separate books and accounts” requirement was satisfied, although the Auditor was able to determine that the section 272 affiliate’s accounting relating to an IRU was not in accordance with GAAP. Insufficient responses were provided by lenders to determine compliance with the “no-recourse” obligation. Data was also unavailable to ascertain compliance with the imputation obligation.

The Commission should expeditiously and meaningfully penalize the Qwest misconduct uncovered by the audit. To the extent compliance cannot be ascertained because the records are no longer (or never were) available, Qwest should be presumed to have violated its obligations. To the extent the data are available, the Auditor ought to be required to collect it and issue a supplemental audit report.

ARGUMENT

I. **THE AUDITOR’S REPORT DEMONSTRATES DISCRIMINATION FAVORING THE SECTION 272 AFFILIATE**

A. **Even The Audit’s Deficient Performance Measures Show Discrimination In Providing Special Access Services Used To Provide InterLATA Services**

1. **The Performance Metrics Used Were Deficient.**

Under section 272(e)(1), a BOC must “fulfill” all “requests” by competing carriers for “exchange access” and other services under the same time standards that it provides to its section 272 affiliates. In interpreting this vital nondiscrimination obligation, the Commission concluded that “the term ‘requests’ should be interpreted broadly” to include, at a minimum, “initial installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services.” First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Non Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905 (1996) (“*Non-Accounting Safeguards Order*”) ¶ 239. For these and any other “equivalent requests,” the Commission’s rules require that “the response time a BOC provides to unaffiliated entities should be no greater than the response time it provides to itself or its affiliates.” *Id.* ¶ 240. Furthermore, “the BOC must make available to unaffiliated entities information regarding the service intervals in which the BOCs provide service to themselves or their affiliates.” *Id.* ¶ 242.

Pursuant to these rules, a BOC must rely on well-defined measurements to demonstrate that its performance in fulfilling competitors’ “requests” is nondiscriminatory. Where robust measurements are used, the Commission and other interested parties can readily determine whether a BOC’s affiliates are obtaining key inputs used in providing long distance, such as

special access services, under more favorable conditions than unaffiliated carriers.² The Qwest audit, however, used performance metrics³ Qwest has proposed in the *Special Access* proceeding⁴ and which AT&T and the Joint Competitive Industry Group (JCIG) have demonstrated mask discrimination.⁵

Thus, two of the three installation metrics exclude all non-standard requests. Under Qwest's Service Interval Guide for Access Services,⁶ many service requests must have non-standard intervals, and will thus be deemed non-standard requests and excluded from the analysis. "Installation Interval" (OP-4) excludes "[o]rders with customer requested original due dates greater than the current standard interval."⁷ "Firm Order Confirmation (FOCs) on Time" metric (PO-5) excludes "individual case basis (ICB) handling based on quantities of lines ... or

² See *Non-Accounting Safeguards Order* ¶ 243 ("If competitors can easily obtain data about a BOC's compliance with section 272(e)(1), this increases the likelihood that potential discrimination can be detected and penalized; this, in turn, decreases the danger that discrimination will occur in the first place").

³ Auditor Report, Appendix A, Attachment A-9.

⁴ *Ex parte* letter from Cronan O'Connell, Qwest, to Marlene Dortch, FCC, CC Docket Nos. 96-149, 01-321, WC Docket No. 02-112 and EB Docket No. 03-197 (May 20, 2004).

⁵ *Ex parte* letter from Aryeh Friedman, AT&T, to Marlene Dortch, FCC, Dkt Nos. 03-197, 03-198, 03-199, 03-200, 96-150, 96-149; and 02-112 (June 7, 2004) ("AT&T's June 7, 2004 *ex parte*"); *ex parte* letter from Gil M. Strobel to Magalie Salas, CC Docket No. 01-321 (June 28, 2004). See also, *ex parte* letter from A. Richard Metzger, Jr. to Magalie Salas, CC Docket No. 01-321 (Jan. 22, 2002) (attaching JCIG Proposal, "ILEC Performance Measurements & Standards in the Ordering, Provisioning, and Maintenance & Repair of Special Access Service"). The JCIG metrics are the performance metrics that should be used in the section 272 audit for special access.

⁶ Service order intervals are found in the Service Interval Guide for Access Services located on Qwest's website, <http://www.qwest.com/wholesale/guides/sig/index.html>. See *ex parte* letter from Cronan O'Connell, Qwest, to Marlene Dortch, FCC, CC Docket Nos. 96-149, 01-321, WC Docket No. 02-112 and EB Docket No. 03-197 (August 19, 2004) ("Qwest's August 19 *ex parte*") at 7.

⁷ Attachment A-9 at 2.

for service/requests types deemed to be projects.”⁸ Yet the “standard interval” for “Facilities Not In Place” is, in all cases, “ICB,”⁹ as is any request for more than a specified minimum number of lines even when facilities are in place (*e.g.* 4 or more DS3 lines).¹⁰

In addition, two installation metrics measure compliance in terms of designated and arbitrary “intervals” masking discrimination within, and outside of, those intervals. Qwest’s “Firm Order Confirmation (FOCs) on Time” metric (PO-5) reports only the percentage of FOCs that are provided to IXC within one of two FOC intervals (3 business days for “DS0, DS1, DS3 & Higher,” and five business days for Feature Group D) that are unreasonable and that mask discrimination both within and outside those intervals.¹¹ Qwest’s “Timely IXC Initiated PIC Change Requests” metric (PC-1), only measures “the percentage of IXC initiated PIC change requests completed within” one of two specified intervals: one day (PC-1A – simple) or three days (PC-1B – complex).¹² This is not the metric mandated by the *General Standard Procedures*

⁸ *Id.* at 3.

⁹ *See also*, Qwest’s August 19 *ex parte* at 8: “If facilities are not available to complete the Design, the order follows the Delayed Order process. A Ready For Service (RFS) date for the required facility is determined by Network. The RFS date + standard interval is then FOC’d to the customer.”

¹⁰ The standard installation interval is itself relatively long, with 9 days for DS-1 service, 7-9 days for DS-3 service and for FGD service (new installations) 14+ days. Qwest’s Service Interval Guide for Access Services at 9-11, 16-17.

¹¹ Attachment A-9 at 3. As shown in AT&T’s June 7, 2004 *ex parte* at 6-7 these FOC intervals are unreasonably long (“Experience and prior audit data demonstrates that a reasonable FOC interval would be 24 hours for FGD, DS0 and DS1 and 72 hours for DS3 service”); *see also*, *ex parte* letter from Brian Benison, SBC to Marlene H. Dortch, FCC, WC Docket No. 02-112 and CC Docket No. 01-321 (August 19, 2004) at 4 (FOC intervals of 24 hours for DS0/DS1 and 72 hours for DS3). Note that the FOC is issued to the customer “[u]pon successful completion of the Assign/Design” and after “the Service Order Processor (SOP) ... electronically notif[ies] the Work Force Administration (WFA) system” and before installation, testing and turn-up. Qwest’s August 19 *ex parte* at 10-12.

¹² Attachment A-9 at 4.

which looked only at a “24 hour” interval regardless of simplicity or complexity.¹³ The unilaterally substituted metric with its three day interval masks discrimination within and outside that longer interval. In addition, leaving the classification of “simple” and “complex” to the discretion of the BOC further allows for the masking of discriminatory conduct.

Finally, the exclusion of “Trouble reports coded to trouble codes for Carrier Action” for all three repair metrics allows for undue coding discretion by the BOC for all the repair-related metrics, masking potential discrimination.¹⁴ Qwest similarly reports that “[t]he repair clock may be stopped for customer caused reasons” without specifying what qualifies as “customer caused reasons.”¹⁵

2. The Audit Report Shows Statistically Significant Evidence of Discrimination Even For The Very Limited Time For Which Data Were Reported.

The Audit Report is patently deficient in reporting the performance metrics data, reporting only two months of data although, at least for the larger customers, data might be available for all twelve months of the engagement period; and at times, miscalculating parity or failing to provide parity scores when they could have been provided. Even with these deficiencies, the data shows statistically significant discrimination for at least three metrics, “Average Installation Intervals,” “% PIC Change Requested w/in 24 hours” and “Mean Time to Restore.”

¹³ *General Standard Procedures for Biennial Audits Required Under Section 272 of the Communications Act of 1934, As Amended Final Procedures, June 8, 2004* (“*General Standard Procedures*”) Qwest Audit Report, Appendix B at 51, which proposed “% PIC change Requests Met (processed within 24 hours).”

¹⁴ *Id.* at 5-7.

¹⁵ Qwest’s August 19 *ex parte* at 17.

First, for every metric except for the PIC change metric, data are reported only for the last two months of the engagement period. The Audit Report asserts that the section 272 affiliate QCC only began reporting exchange access performance metrics in November 2003 when QCC began purchasing exchange access for the provision of interLATA long distance service. Before that time, Qwest provided voice long distance services through Qwest LD Corp. (“QLDC”) by resale to consumer and small business customers in the states where it had received section 271 authorization.¹⁶ Thus *no* data are provided (except for PIC changes) for ten of the audited months for services provided by Qwest to any of its customers, including any of its larger (medium to enterprise) customers who may have been provisioned directly rather than through resale.

Second, as shown by the attached Declaration of statistician Dr. Robert Bell,¹⁷ the tabled parity scores for proportions miss many instances of statistically significant disparities. There are two reasons: cases where parity scores are not computed at all and cases where they are computed incorrectly. Bell Decl. ¶ 7.¹⁸ Nor can an independent reviewer make a correct calculation for the interval measures (“Average Installation Interval” and “Mean Time to Restore”) because critical data, including the “standard deviation,” are not provided. Bell Decl. ¶ 14.

¹⁶ Qwest Audit Report, Appendix A, Objective VIII, Procedure 4 at 37.

¹⁷ Attachment 1 hereto.

¹⁸ The methodology was disclosed by Qwest in the *ex parte* letter from Cronan O’Connell, Qwest, to Marlene Dortch, FCC, CC Docket Nos. 96-149, 01-321, WC Docket No. 02-112 and EB Docket No. 03-197 (May 20, 2004) (“Qwest’s May 20 *ex parte*”) “Regulatory Reporting, 272 Service Performance Measurements, 272 Statistical Methodology, 8 January 2004. This reference is ambiguous as to whether the critical value is always 1.645 or might be higher. Bell Decl. ¶ 6.

Even with these fatal deficiencies, the data show discrimination in favor of the section 272 affiliate. Even with only two months of data for “Average” Installation Interval (OP-4) “the pattern of results across the region provides substantial evidence of longer intervals for non-affiliated carriers than for the section 272 affiliate for each of DS0, DS1, and DS3.” Bell Decl. ¶ 15.

There was also evidence of discrimination with respect to the repair metric “Mean Time to Restore.” Bell Decl. ¶ 19. Disparities were statistically significant for both months in Iowa and Nebraska and for one month in North Dakota. *Id.*

There was also clear evidence of discrimination in PIC changes. In both Wyoming and North Dakota, there was a strong, statistically significant pattern of poorer performance for non-affiliates than for section 272 affiliates. Non-affiliates faced higher proportions of misses in almost every month, and aggregate results showed that the overall differences were statistically significant. Bell Decl. ¶ 9. In Wyoming, although the Qwest-supplied parity scores only indicated statistical significance for three months, the differences were statistically significant for a total of seven months, and across all 12 months, the proportion of missed (requests not processed within 24 hours) was four times higher for non affiliates. Bell Decl. ¶ 10. Discriminatory treatment was also evident in North Dakota in 10 of 12 months. Bell Decl. ¶ 11.

Qwest proffered three “root causes” for the conceded PIC discrimination.¹⁹ The first two related to the downstream provisioning system(s) which “were not capturing all ported telephone information ... due to incorrect information on the service order,” and “[one system] was not being updated for all switch generic changes, exchange key and CLLI code updates.”²⁰ Qwest

¹⁹ Qwest Audit Report, Appendix A, Objective VIII, Procedure 5 at 38-39.

²⁰ *Id.* at 38.

asserted that the latter was corrected in September, 2003. The third cause was “[h]uman error.”²¹ There was no indication to what extent each factor accounted for the preferential treatment of the section 272 affiliate, or why these three factors seemed to have more heavily affected non-affiliated carriers.²²

B. Qwest Has Improperly Steered Callers To The Section 272 Affiliate

Qwest failed to comply with the section 272(c)(1) requirement that a BOC’s sales representatives must inform new customers that, in addition to the BOC’s affiliates, other carriers provide long distance services.²³ For seventeen percent (17%) of the randomly selected calls (19/114) the Qwest customer service representative marketed Qwest long distance services but did not inform the customer of his/her right to choose a long distance carrier.²⁴ Qwest, in its response, concedes a problem exists and identifies the corrective action which it has taken. Thus, the initial training was “updated [after the audit] to reinforce 272 scripting requirements.”²⁵ New monitoring procedures were put in place, but they were limited to having a

²¹ *Id.* at 39.

²² Qwest also did not begin posting intervals as they committed to do in the 271 proceedings, until 2004. *Id.*, Procedure 6 at 40, citing the commitments at note 30.

²³ 47 U.S.C. § 272(c)(1). As the Commission has explained, section 272(c) establishes an “unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities.” *Non-Accounting Safeguards Order* ¶ 197. This anti-discrimination duty is to be applied using a “stringent standard.” *Id.*

²⁴ Qwest Audit Report, Appendix A, Objective VII, Procedure 6 at 29.

²⁵ Qwest’s Response to the Auditor’s Report, Appendix C at 8. It is interesting to note that, on the one hand, center representatives at Qwest’s Business, but not its Consumer Call Centers were required to sign an “Acknowledgement Form” at the end of their initial training course to confirm they understood the Section 272 requirements and what actions they must take to remain compliant while, on the other hand, intermittent section 272 compliance reminders were sent to consumer, but not business, call representatives. Qwest Audit Report, Appendix A, Objective VII, Procedure 8, at 31 and Table 1.

newly created Quality Assurance Group on the consumer side, and Random Remote Observers on the small business side, monitor 10 calls per sales center each month – a far too small of a sample to be considered sufficient. Finally, new disciplinary procedures were also adopted but they too were limited – only sales representatives unfortunate enough to have been caught committing violations on the ten monthly sampled calls could be disciplined. Qwest’s claims that “steering” by its calling center representatives declined after the engagement period (in the first four months of 2004) but that was not verified by the Auditor or any other independent third party observer, does not excuse violations during the audit period, and in any event, still shows an unacceptable level of improper steering (e.g. showing non-compliance in over half of its Consumer Sales Center in February 2004 – with only 70% compliance at its sales center in Denver – and showing non-compliance at all three of its Business Sales Center for that month).²⁶

C. Other Evidence Of Discrimination Prohibited By Section 272(c)(1)

The Auditor identified two instances where the affiliate may have received a preferential rate for a service also provided to an unaffiliated carrier in violation of 272(c)(1).

First, the Auditor found a preferential rate charged to the section 272 affiliate for at least two services in Wyoming. The first involved a rate element priced to the section 272 affiliate at or up to one-half of what non-affiliated carriers were charged.²⁷ The second involved billing and

²⁶ There were also the additional violations identified in the Qwest Audit Report, Appendix A at 48 (“Additional Disclosures”), and the subject of the May 7, 2003 and May 28, 2004 Consent Decrees.

²⁷ Qwest Audit Report, Appendix A, Attachment A-7, Line 2. The Auditor, comparing three USOCs by class of service billed to the section 272 affiliate and unaffiliated entities reported that for one USOC the charge was \$6.21/unit for 4 units, while one non-affiliated carrier was charged \$12.45 and 760 Customers were billed in a range of \$(4.13) to \$12.44. The USOC was “SBG, Miscellaneous Charges, Special Billing Arrangements, Change of Responsibility.” The Auditor should have disclosed how many non-affiliated carriers were billed more than the section 272 affiliate.

collections services, which not only affected charges in Wyoming in September 2003,²⁸ but also other states (Idaho, Arizona, Oregon and North Dakota) between June and September 2003. Non-affiliated carriers were also apparently charged a higher rate than the section 272 affiliate for space and furniture rental.²⁹

Second, in a comparison of rates billed in a sample using seven IXC's in December, 2003 the Auditor found 465 differences in rates billed, 70% (321) in favor of the section 272 affiliate³⁰ in violation of section 272(e)(2)'s requirement that BOCs may not discriminate with respect to the provision of facilities, services, or information concerning exchange access.³¹ The Auditor noted Qwest's explanations included varying percent of interstate usage ("PIU"),³² "shared

²⁸ *Id.*, Attachment A-8, Lines 3-4, 10-13, and 28-30.

²⁹ *Id.* at Lines 44-46 (\$28.00 rather than \$26.86sq.ft./year in 1/03, 7/03 and 9/03).

³⁰ The Auditor used a random sample of 114 unique USOCs billed to the section 272 affiliates by state and class of service and eight "judgmentally selected" interexchange carriers. The differences vary but for many it is very significant. *See e.g.*, Line 83 (272 affiliate: \$28.00, non-affiliate: \$280.75) *see also* Line 84 (272 affiliate: \$28.00, non-affiliate: \$136.66); Lines 146-149 (272 affiliate: \$0.47, non-affiliate: between \$103.11 and \$128.34); Lines 151-153 (272 affiliate: \$0.21, non-affiliate: between \$84.71 and \$137.65); Lines 234-239 (272 affiliate: \$25.07, non-affiliate: between \$147.07 and \$663.88); *see also*, Lines 163-164 (272 affiliate: \$64.68, non-affiliate: between \$167.82 and \$376.57); and Lines 168-172 (272 affiliate: \$113.30, non-affiliate: between \$188.29 and \$356.11). Qwest Audit Report, Appendix A, Objective IX, Procedure 2 at 41-42 and Attachment A-12.

³¹ 47 U.S.C. § 272(e)(2).

³² That is the amount of traffic a carrier's network will transport across state boundaries. Based on the PIU, each circuit for each customer is billed at either the FCC Tariff 1 or the appropriate state access tariff. The PIU can range from 100% interstate to 0% interstate and each change in percentage will cause a different amount for that USOC for that particular circuit. This did not apply to USOC REB3X. Qwest claims that the actual rate for REB3X USOCs was \$0.04 and was consistent among customers. Attachment A-12, Lines 95-106 shows otherwise (showing nonaffiliated carriers paying anywhere between \$1.32 and \$176.04 in MN while the 272 affiliate was charged \$.24 and between \$4.44 and \$205.16 in CO while the 272 affiliate was charged \$13.16). As explained by Qwest, the .04 charge "was not apparent in the testing because the quantities provided to the "practitioner" for this USOC were from the journals table, which stores a default quantity of "one" for each charge entry. The actual quantity is used in

use,”³³ that certain USOCs are tied to other USOCs, and that the combination drives the amount billed.³⁴ Even if correct (and this does not appear to have been verified by the Auditor), the Auditor did not determine whether these factors fully explained the differential.

D. The Audit Report Could Not Establish Compliance With the Imputation Obligation

Under section 272(e)(3) the BOCs are required to impute access costs for each identifiable service offering.³⁵ Here the Auditor found no substantiation for the imputed costs for two unregulated services: E-911 (as an information service) and National Directory Assistance (“NDA”) services.

There were problems with the imputation of access, switching and transport for E911 service. Qwest represented that the rates used in the calculation of amounts imputed for E911 service were based on an Official Communications Services (“OCS”) cost study performed in 1999. When the Auditor asked for the tariff rates used in this study, Qwest was able to provide support for only one of the tariff rates used. The Auditor randomly selected 100 unique USOC/state combinations and compared the rates used in the OCS cost study to the current tariff rate posted on the Qwest website. For 61% of the rates, the USOCs used in the OCS cost study

calculating the billed amount but it is not passed to journal records and therefore was not on file.” Qwest Audit Report, Appendix A, Objective IX, Procedure 2 at 41-42. The Auditor ought to be allowed to verify this assertion.

³³ This factor apportions or reduces a transport facility based on the number of channels being utilized for Switched Access. Again, this did not apply to USOC REB3X. *Id.* at 42.

³⁴ Other explanations, primarily for the negative amounts include negative amounts for monthly recurring charges that are the result of rebills and that the Qwest BOC bills for services a month in advance. When a customer disconnects service or a circuit, a fractional credit (which appears as a negative amount) is generated for the days already billed but unused. *Id.* at 42.

³⁵ 47 U.S.C. § 272(e)(3) (requires that BOCs may not discriminate with respect to the amount charged or imputed for access to telephone exchange and exchange access).

were not available on the website.³⁶ For 20%, the rate published on the website was different from the rate used in the OCS cost study.³⁷

For National Directory Assistance, the amounts imputed were also based on a 1999 cost study. The total expenses in this study “included quotes from unaffiliated entities for interLATA facilities, however the Qwest BOC could not provide supporting documentation for these quotes.”³⁸

The Auditor further reported that the section 272 affiliate paid the BOC over \$23.7 million more than it was billed, and over \$22.6 million more than the section 272 affiliate recorded as an expense, for local exchange access and exchange access services provided by the BOC to the affiliate during the one year engagement period.³⁹ The explanation proffered by the section 272 affiliate, that “amounts paid include services in addition to local exchange and exchange access, such as usage charges, operator services, directory assistance, taxes and surcharges” and included disputed amounts, was neither verified by the Auditor nor determined to fully explain the \$22-23 million difference.

II. THE AUDITOR’S REPORT ESTABLISHES PERVASIVE VIOLATIONS OF THE AFFILIATE TRANSACTION RULES

A. Forty Percent Of The Affiliated Agreements Were Not Posted On Time, The Delays Often Years After The Agreements Were Executed

Section 272(b)(5) requires an interLATA affiliate to “conduct all transactions with the Bell operating company of which it is an affiliate on an arm’s length basis with any such

³⁶ Qwest Audit Report, Appendix A, Objective X, Procedure 2 at 45.

³⁷ *Id.* at 44. *See also* Attachment A-13.

³⁸ *Id.* at 45.

³⁹ *Id.*, Procedure 3 and Table 4

transactions reduced to writing and available for public inspection.” 47 U.S.C. § 272(b)(5). This includes the obligation that the interLATA affiliate must post the terms and conditions of the transaction on the company’s home page on the Internet within 10 days of the transaction. *Implementation Of The Telecommunications Act Of 1996: Accounting Safeguards Under The Telecommunications Act Of 1996* CC Docket No. 96-150 11 FCC Rcd. 17539, 17593-94 (1996) (“*Accounting Safeguard Order*”).

Qwest systematically violated this requirement. The Audit Report disclosed that 33 out of a *random* sample of 80 affiliated agreements, or 41%, were posted on the website months, and often years, after their effective date.⁴⁰ Nineteen additional agreements were voluntarily disclosed by Qwest,⁴¹ for a total of 52. One quarter of those web posting violations (13/52) were in excess of one year – indeed many were over two or even three years.⁴²

Qwest attempts to dilute the percentage of late-posted affiliate agreements by adding the self-reported violations to the late-posted agreements identified by the Auditor in the random *sample* and then arguing that the percentage of late-posted agreements should be calculated using

⁴⁰ Qwest Audit Report, revised p. 16 appended to Letter from Deena McKinney, Ernst & Young to Marlene H. Dortch, FCC, EB Docket No. 03-198 (July 8, 2004) (“July 8, 2004 Errata Filing”).

⁴¹ Qwest Audit Report, Appendix A, Attachment A-5.

⁴² They include: (i) Attachment A-5, Line 23; (ii) Attachment A-4, Line 26; (iii) Attachment A-4, Line 11/Attachment A-5, Line 16 (in some instances the same agreement was identified in both Attachment A-4, by the Auditor in the random sample, and Attachment A-5, self-identified by Qwest); (iv)-(v) Attachment A-4, Line 16, Attachment A-4, Line 18/Attachment A-5, Line 13 (Qwest classifies 16 and 18 as one arrangement because the amendment noted in Line 16 “supplements” the amendment in Line 18; yet each amendment should be posted and the failure to do so in a timely manner should be considered a separate violation); (vi) Attachment A-4, Line 2/Attachment A-5, Line 17; (vii) Attachment A-4, Line 33; (viii) Attachment A-4, Line 29/Attachment A-5, Line 15; (ix) Attachment A-5, Line 1; (x) Attachment A-5, Line 2; (xi) Attachment A-5, Line 25; (xii) Attachment A-4, Line 31/Attachment A-5, Line 27; and (xiii) Attachment A-4, Line 9.

this sum as a percentage of the total *universe* of all Internet section 272 transactions/posting.⁴³ Qwest's argument is invalid for at least two reasons. First, Qwest misstates, and therefore overstates the size of, the universe. The universe from which the sample was taken was not "458 Internet section 272 transactions/posting" but rather 147 affiliate agreements.⁴⁴ Second and more fundamentally, one cannot legitimately add to the violations found in the random sample taken by the Auditor, the violations self-identified by the party being audited, and then conclude that all the violations in the entire universe have been identified. Only if the Auditor had looked at all the agreements and then identified only 52 violations would such a calculation be appropriate. In any event, random sampling would posit that slightly over 40% of the universe of 147 agreements (or 59 agreements) would have been posted late. The self-identification of 19 additional agreements, for a total of 52 late-posted agreements identified to date, is not inconsistent with the statistical principle that the 40% random sample results are generalizable to the universe.

1. Services Under Twenty Percent Of The Late-Posted Agreements Were Provisioned Even Before The Written Affiliate Agreements Were In Effect.

The Auditor identified nine affiliate agreements (9/33 or 20%) in which services were provisioned months, if not years, before the written affiliate agreement was in place. Two-thirds (6/9) were not executed until after Qwest received Section 271 approval.⁴⁵

The violations included three agreements involving services provided by the section 272 affiliate (QCC) to the BOC (QC). Two were not executed and/or posted until after Qwest

⁴³ Qwest's Response, Appendix C at 3.

⁴⁴ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 4 at 15.

⁴⁵ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 4 at 16, Attachment A-3.

received section 271 authority, including one executed eight months after services were first provisioned (and not posted on the website for an additional 17 days),⁴⁶ and a second not executed until a year after service was first provisioned (and not posted to the website until possibly a year later).⁴⁷ The third agreement was not executed and posted on the website until a year and four months after services were first provisioned.⁴⁸

The violations identified by the Auditor also included six agreements where the BOC (QC) provided services to the section 272 affiliate (QCC), with four (or two thirds) not executed or posted until after Qwest had received section 271 authority. Two of these arrangements dated back to when QCC “became a section 272 affiliate,” in March 2001,⁴⁹ with one agreement not effective until two years and four months after the services were first provisioned⁵⁰ and not

⁴⁶ “Amendment 1 to Lease of Equipment Space and Power Task Order” a lease of collocated equipment space and power. Service was first provisioned on November 1, 2002 but the agreement was not executed until June 30, 2003, Attachment A-3, Line 8; it was posted on the website July 17, 2003, Attachment A-4, Line 25.

⁴⁷ “Use of Internally Developed Software Task Order” an e-site service agreement. Service was first provided on June 1, 2001 but the agreement was not executed until May 31, 2002, Attachment A-3, Line 9, and not posted to the website until either June 4, 2002 (Attachment A-5, Line 7) or June 4, 2003 (Attachment A-4, Line 26). Qwest itself classifies this as a post-Section 271 violation, Qwest’s Response, Appendix C, Attachment 1 at 3.

⁴⁸ “Amendment 1 to Task Order – Audio Conferencing.” Service was first provided on July 1, 2000 but the Agreement not effective until November 14, 2001, Attachment A-3, Line 3. It was posted either on that day, Attachment A-4, Line 9, or Qwest now claims, two weeks before the effective date, November 1, Qwest’s Response, Appendix C, Attachment 1 at 1, although why it would be posted before the agreement was executed is unclear.

⁴⁹ Attachment A-3. Line 6 (both first provisioned on March 1, 2001), although Qwest elsewhere states that QCC was held out as a section 272 affiliate on or about March 26, 2001, Attachment A-4, Line 23.

⁵⁰ “Amendment to the Billing and Collections Services Agreement” involving IT developmental services, effective on July 1, 2003, two years and four months after the services were first provisioned. Attachment A-3, Line 5.

posted for an additional 10-13 days.⁵¹ The second March 2001 agreement (and an amendment thereto) was not effective or posted on the website until almost two years after services were first provisioned.⁵² A third agreement was also not executed or posted until almost two years after services were first provisioned,⁵³ and a fourth was not executed until nine months after services were first provisioned (it took another 17 days after that before the agreement was posted on the website).⁵⁴ Neither of the two arrangements posted before Qwest received section 271 authorization were executed and/or posted until approximately two months after service was first provisioned.⁵⁵

⁵¹ This agreement was not posted on the website until either July 11, Attachment A-5, Line 16, or July 14, 2003, Attachment A-4, Line 11.

⁵² “Data Network Trouble Management Call Transfer Service Work Order” and Amendment #1 thereto. Neither was posted until February 7, 2003. Attachment A-3, Line 6; Attachment A-4, Lines 16 and 18, and Attachment A-5, Line 13.

⁵³ “Use of Voice Switching Equipment.” Service was first provided on November 9, 2001 but the agreement was not effective until August 6, 2003, Attachment A-3, Line 1. It was not posted on the website until August 14, 2003, Attachment A-4, Line 2; Attachment A-5, Line 17.

⁵⁴ “Amendment 20 to Work Order – Finance Services” involving the provisioning of out-of-region cash management functions. Service was first provisioned on August 1, 2002, but the agreement was not in place until March 1, 2003, Attachment A-3, Line 2. It was not posted on the website until March 18, 2003 Attachment A-4, Line 3/Attachment A-5, Line 14.

⁵⁵ The two agreements were: (i) “Billing and Collections Services Agreement,” with service first provided on September 1, 2001, although the agreement was not signed and final until October 30, 2001, Attachment A-3, Line 4, and not posted until November 8, 2001, Attachment A-4, Line 10; (ii) “Global Business Accounts General Support Services” an out-of-region service order processing agreement, first provisioned on August 1, 2002, but the Agreement was not executed until September 13, 2002, Attachment A-3, Line 7, and not posted until October 3, 2002, Attachment A-4, Line 21.

2. Four Of The Late-Posted Agreements Were Only Posted In February 2004, After The Engagement Period.

Three agreements were filed one day before, and one just over a week before, the Auditor's "testing date of February 14, 2004."⁵⁶ The three agreements posted on February 13, 2004, involved services provided by the BOC to the section 272 affiliate and were posted on Qwest's website 3-6 months after they were effective.⁵⁷ The fourth agreement, which involved the provisioning by the section 272 affiliate to the BOC, was posted on Qwest's website on February 5, 2004, a year and a half after the agreement was effective.⁵⁸

3. Almost Two-Thirds Of The Agreements In The Random Sample Found To Have Been Posted Late And An Additional Four Agreements Self-Reported By Qwest Were Posted In 2003, During The Engagement Period And after Qwest Received Section 271 Approval.

In addition to the four agreements not posted until 2004, twenty agreements⁵⁹ identified in the random sample and four additional agreements self-identified by Qwest⁶⁰ were not posted until 2003 and after Qwest received section 271 authorization.

Five of these twenty-four 2003 late-posted affiliate agreements involved the section 272 affiliate providing services to the BOC. Two of these agreements were, as noted above, not

⁵⁶ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 5 at 16.

⁵⁷ This includes one posted six months late ("Local Service Provider Identification Information" between QC and QLDC, effective August 3, 2003, Attachment A-5, Line 31); another posted five months late ("Use of Customer lists" between QC and QLDC, effective September 3, 2003, Attachment A-5, Line 32); and a third posted three months late ("Account Data Verification" provided by QC to QCC effective November 3, 2003, Attachment A-5, Line 20).

⁵⁸ "Amendment 4 to Task Order – Interlata Svcs for OCS" provided by QCC to QC, effective August 2, 2002 (Attachment A-5, Line 23).

⁵⁹ Attachment A-4, Lines 1-4, 11-16, 18 (assuming this is independent of 16), 20, 22, 25-27, 29-30 and 32-33.

⁶⁰ Attachment A-5, Lines 19, 26, and 29-30.

even executed, let alone posted on the website, until months or year(s) after service was first provisioned.⁶¹ Two other agreements were posted three⁶² to four months⁶³ late. The fifth agreement involved services provided by QLDC to QC⁶⁴ although QLDC represented that it did not provide any services to QC during this time frame.⁶⁵

Nineteen other agreements involved the BOC providing services to the section 272 affiliates QCC (although QCC represented that it only started offering or provisioning in-region interLATA services on November 3, 2003) and QLDC. Almost a third (6/19) of these nineteen agreements, all with QCC, involved delays of almost two to over three years in posting. This included the four agreements identified above where services were provisioned even before the agreements were in effect with posting delays of approximately two years.⁶⁶ The two other agreements similarly involved posting delays of approximately two to over three years.⁶⁷ Other

⁶¹ See text accompanying notes 46 and 47 *supra*.

⁶² Attachment A-4, Line 27 (Amendment 6 to Task Order – Sale of Spare Inventory, effective November 10, 2002 but not posted until February 3, 2003).

⁶³ Attachment A-5, Line 19 (“Task Order – Reports” QCC MRC report with QCC information used by QC wholesale). Agreement effective June 4, 2003 but not posted until October 31, 2003.

⁶⁴ “Data Information Request Task Order” Attachment A-4, Line 12, provided September 4, 2003 but not posted until September 15, 2003.

⁶⁵ Qwest Audit Report, Objective V/VI, Procedure 7, Appendix A at 19 (“QLDC represented that it did not provide any services to the Qwest BOC during the Audit Test Period”). The Audit Test Period was from January 2, 2003 through September 30, 2003. Qwest Audit Report, Appendix A at 4, n. 11.

⁶⁶ See text accompanying notes 49 to 54 *supra*.

⁶⁷ “Trouble Ticket Status for ATM/Frame Relay,” Attachment A-4, Line 33 (effective September 11, 2001 but not posted until August 28, 2003) and “One Way Select Service Agreement” Attachment A-4, Line 29/Attachment A-5, Line 15 (effective April 20, 2000 but not posted until July 9, 2003).

post-section 271 authorization web posting violations covered a broad range of services, including finance services,⁶⁸ Information Technologies services,⁶⁹ Network Services⁷⁰ and Consumer Markets Joint Marketing,⁷¹ with most posted two to over seven months after the effective date of the agreement.

4. The Pre-Engagement Period Violations Are Relevant; Many Were Posted Over A Year Late; The Others Were, For The Most Part, Posted Months After The Agreement Was Effective.

There were twenty-five pre-engagement violations identified in the Audit Report.⁷² The random sample identified ten violations where the agreement was not posted until between July and December, 2002, around the dates Verizon filed its section 271 applications.⁷³ Three other

⁶⁸ This includes *three* amendments to Work Order – Finance Services (QC to QCC): (i) Amendment 19, Attachment A-4, Line 20; (ii) Amendment 20, Attachment A-4, Line 3; and (iii) Amendment 24, Attachment A-4, Line 4 (almost two months), and *two* amendments to Work Order – Finance Services (QC to QLDC): (i) Amendment 3, Attachment A-4, Line 32 (over 1 month) and (ii) Amendment 4, Attachment A-4, Line 13/ Attachment A-5, Line 24 (over 2 months).

⁶⁹ This includes: (i) Information Technologies Services Work Order, QC to QCC, Attachment A-4, Line 22/Attachment A-5, Line 22 (3 months); (ii) Amendment 2 to Work Order – Information Technologies Services, QC to QLDC, Attachment A-4, Line 14/Attachment A-5, Line 28 (7 months); and Amendment 3 to Information Technologies Services Work Order, QC to QLDC: Attachment A-4, Line 15 (almost 1 month).

⁷⁰ Attachment A-4, Line 1/Attachment A-5, Line 18 (almost 2 months).

⁷¹ Attachment A-5, Line 26. The other agreements included: (i) “Printing and Processing,” Attachment A-5, Line 30 (over 2 months); (ii) Trouble Management Call Transfer Service (Amendment # 1), Attachment A-4, Line 30 (almost 2 months); and (iii) Informational Services, Attachment A-5, Line 29 (almost 7 months).

⁷² Attachment A-4, Lines 5-10, 17, 19, 21, 23-24, 28 and 31, Attachment A-5, Lines 1-5, 8-12, 21 and 25.

⁷³ One in July 2002 (Attachment A-4 Line 24), and three each in the months of September 2002 (Attachment A-4 Lines 6, 8 and 21); October 2002 (Attachment A-4 Lines 17, 19 and 28); and December 2002 (Attachment A-4 Lines 5, 7 and 31). On June 13, 2002, Qwest Communications International Inc. (“QCII”) filed section 271 multi-state applications for authorization to provide in-region, interLATA service in Colorado, Idaho, Iowa, Nebraska, and North Dakota (“Qwest

agreements in the random sample were posted in 2001.⁷⁴ An additional twelve agreements were self-identified by Qwest, half between August and December 2002; only one was posted at the end of 2001.⁷⁵

Five of the agreements involved posting delays in excess of one year. This included the one instance noted above where service was provided a year and four months before the agreement was even executed.⁷⁶ It also included two Information Technologies Services agreements, one provided by the BOC (QC) to the section 272 affiliate (QCC) and the other by QCC to QC,⁷⁷ and two other apparently related billing and collection amendments not posted until one year and nine months after the agreement was effective.⁷⁸

I”); and on July 12, 2002, for Montana, Utah, Washington, and Wyoming (“Qwest II”), both ultimately withdrawn. QCII again filed at the end of September, 2002 for all nine states, *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-134, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26320 (2002) (“Qwest 9-State Order”).

⁷⁴ Attachment A-3, Lines 3 and 4 and corresponding Attachment A-4, Lines 9-10, also Attachment A-4, Line 23. Only one, Attachment A-4, Line 9 was disclosed in the Section 271 application process.

⁷⁵ The August-December 2002 late posted agreements are identified in Attachment A-5, Lines 9-12, 21 and 25. Other late posted agreements filed in 2002 include Attachment A-5, Lines 1, 3-5 and 8. The twelfth agreement was posted on December 28, 2001, Attachment A-5, Line 2, and may be related to an agreement posted in February 2002, *see* text accompanying note 77 *infra*.

⁷⁶ *See* text accompanying note 48 *supra*.

⁷⁷ One was a Task Order from QCC to QC, Attachment A-5, Line 1, posted on February 14, 2002 (583 days after the effective date), Qwestnet access provided by QCC to QC. The other was Amendments 2 and 3 to Work Order – Information Technologies Services, Attachment A-5, Line 2, posted on December 28, 2001 (535 days after the effective date), QNET access provided by QC to QCC. Qwest Response, Appendix C, Attachment 1, at 1, Issue 4.

⁷⁸ Attachment A-5, Line 25; Attachment A-4, Line 31/Attachment A-5, Line 27.

There were six posting violations related to services provided by the section 272 affiliate (QCC) to the BOC.⁷⁹ There were an additional fourteen posting violations related to services provided by the BOC to the section 272 affiliate (QCC or QLDC), including the two violations noted above where service was provisioned to the section 272 affiliate months before the agreements were in effect.⁸⁰ The delays for the other agreements were, in most instances, months after the agreements were effective.⁸¹

⁷⁹ They were: (i) Amendment 1 to Task Order – Prepaid Calling Cards, Attachment A-5, Line 12, effective January 1, 2002 but not posted until September 12, 2002; (ii) Task Order – Consulting Services, Attachment A-5, Line 10, effective March 25, 2002 but not posted until September 3, 2002; (iii) Services Agreement, effective date January 10, 2001, *see* Qwest's response at Attachment 1 p. 1, or January 19, 2001, *see* Attachment A-4, Item 23, but not posted until March 26, 2001; (iv) Lease of Fiber Optic Lines Task Order, Amendment #5, Attachment A-4, Line 8, effective September 1, 2002 but not posted until September 27, 2002; (v) InterLATA Services for Official Company Services Task Order, Amendment #3, Attachment A-4, Line 24/Attachment A-5, Line 6, effective July 1, 2002 not posted until July 17, 2002; and (vi) Amendment 7 to Task Order – Space & Furniture Rental, Attachment A-4, Line 28, effective October 1, 2002 but not posted until October 31, 2002.

⁸⁰ *See* text accompanying note 55 *supra*.

⁸¹ There were three posting violations related to the Finance Services Work Order (with delays of between over two and over eight, months): (i) Amendment 9, Attachment A-5, Line 8, effective October 1, 2001 but not posted until January 17, 2002; (ii) Amendment 10, Attachment A-5, Line 3, effective July 1, 2001 but not posted until March 14, 2002; and (iii) Amendment 18, Attachment A-4, Line 19, effective August 1, 2002 but not posted until October 3, 2002. There were two violations related to National Business Accts – Service Order Processing Agreement: (i) Attachment A-5, Line 5, effective October 1, 2001 but not posted until May 10, 2002; (ii) Amendment 1 to Work Order National Business Accounts Market Support for QCC, Attachment A-4, Line 6, effective date was September 1, 2002 but not posted until September 18, 2002. The remaining violations included: (i) Global Business Accts – Service Order Processing, Attachment A-5, Line 4, effective October 1, 2001 but not posted until April 19, 2002; (ii) Amendment 1 to Work Order – National Consumer Bus. Office Referrals, Attachment A-5, Line 11, effective July 1, 2002 but not posted until October 28, 2002; (iii) Amendment 5 to Work Order – Wholesale Sales and Service, Attachment A-5, Line 21, effective date September 01, 2002, but not posted until October 14, 2002; (iv) Work Order – Trouble Ticket Status for ATM/Frame Relay, Attachment A-5, Line 9, effective July 12, 2002 but not posted until August 15, 2002; (v) Operator and Support Personnel Services Amendment, Qwest's response identifies the effective date as August 1, 2002, Appendix C, Attachment 1 at 1, Issue # 19, while Attachment A-4, Line 17 identifies the effective date as October 1, 2002, but both list the web posting date as October 17, 2002; (vi) Amendment 1 to Work Order – Internal

Qwest argues that the 25 agreements posted before it received section 271 authorization in January 2003 “are not inconsistent with the Commission’s rules interpreting Section 272” because “the Commission’s judgment about Qwest’s compliance with section 272 is a predictive one” (citing to the *Qwest 9-State Order*, ¶ 397) and that therefore “Qwest’s section 272 compliance is measured from the date of section 271 authorization forward.”⁸² However, Qwest misreads both the Commission’s rules and the *Qwest 9-State Order*. A plain reading of the *Accounting Safeguard Order* and 47 C.F.R. § 53.207(e), makes it clear that affiliate agreements not posted “on the Internet within 10 days of the transaction through the company’s home page” “are inconsistent with the Commission’s rules interpreting section 272[(b)(5)]” even if, as here, the late postings related to agreements in effect during the section 272 audit period but posted before (and here likely spurred by) the BOC’s section 271 filing.⁸³ And the Commission’s “predictive judgment” in the *Qwest 9-State Order* again presumed a follow-up section 272 audit involving a review by the Auditor of *all* agreements in effect during the engagement period regardless of when the late posting occurred.⁸⁴ All 80 agreements sampled by the Auditor were in effect during the Audit Test Period.⁸⁵

Data Network Connections, Attachment A-4, Line 5, effective December 1, 2002, but not posted until December 23, 2002; and (vii) Amendment 15 to Work Order – Space & Furniture Rental, QC to QCC, Attachment A-4, Line 7, effective date was November 1, 2002 but not posted until December 4, 2002.

⁸² Qwest’s Response, Appendix C at 5.

⁸³ *The Accounting Safeguard Order* ¶ 122 (which requires all affiliated agreements, without qualification, to be posted on the Internet).

⁸⁴ *Qwest 9-State Order*, ¶¶ 410-411.

⁸⁵ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 4 at 15.

5. The Section 272 Affiliate Applied A Discount Or Added A Surcharge In Addition To The Basic Rate Charges Which Were Not Included In The Affiliate Agreements Posted On The Qwest Internet Site.

The Auditor also found for 63 of 75 sampled billed records (75%) that the section 272 affiliate applied a discount of varying amounts or added a surcharge of \$0.05 where those discounts or surcharges were not posted on the website.⁸⁶ Qwest has conceded the error, claiming it posted the required disclosure on April 13, 2004.⁸⁷

B. The Proffered Justifications For These Delays Are Neither Credible Nor Sufficient

Qwest's proffered justifications reduce themselves to two, identified as "Note A" and "Note C."⁸⁸ Most frequently used is "Note A," inadvertence, the error claimed to have been "discovered and corrected by Qwest review controls."⁸⁹ This was the explanation proffered for almost half (16/33) of the violations in Attachment A-4 and over 80% (26/32) of the violations in Attachment A-5. As shown below,⁹⁰ "inadvertence" is nothing more than, at best, wholly inadequate internal control procedures, with "Qwest's review controls" not identifying almost

⁸⁶ *Id.* at 20-21.

⁸⁷ Qwest's Response at 6.

⁸⁸ See Qwest Audit Report, Appendix A, Attachments A-4 (Notes A and C) and A-5 (Note A). "Note B: Billed back to Qwest/US West Merger date, disclosed in Qwest's Section 271 application process" was used to explain one violation in Attachment A-4 and two violations in Attachment A-5. Related thereto, Qwest argued that it did not violate the posting obligations if: (i) it posted "concurrent with the date QCC was held out as a section 272 affiliate, Attachment A-4, Line 23, or (ii) if it disclosed the violation in the section 271 application process," Attachment A-5, line 12. As discussed *supra*, text accompanying notes 82 to 85, neither the date of the web posting nor disclosure in the section 271 proceeding shields these violations of section 272.

⁸⁹ Attachment A-4 and Attachment A-5, "Note A" which stated: "A function inadvertently not identified within 10 days of provisioning but discovered and corrected by Qwest review controls."

⁹⁰ Section II.D *infra*.

half the violations until at least six months after the agreement was effective, and in over half of those cases, not even within a year.⁹¹ In any event, the Commission has already held that “inadvertence” is not a defense.⁹²

The second most frequently asserted explanation was “Note C: Amendment to a work order to reflect affiliate transaction repricing, which was made effective the first day of the month” and Qwest does not consider repricing amendments a late posting but rather “a routine update to the Agreement.”⁹³ This is used to explain approximately one-quarter (8/33) of the violations in Attachment A-4, mostly involving one or two month violations. Related thereto, Qwest claims that it need not make a web posting to add new locations, add a routing feature, update or correct a rate, or otherwise “clarify” terms.⁹⁴ For some violations explained by “Note C”, the explanation is simply not credible because the violations do not appear to involve repricing – *see, e.g.*, the failure to execute and then post a collocation arrangement involving the provisioning of service and equipment.⁹⁵ In any event, Qwest’s position both as to repricing and

⁹¹ Thirty violations were coded “Note A” – 16 violations took up to a half a year to be identified; another 7 within 6 months to a year and the remaining 8 over one year.

⁹² *Verizon Telephone Companies, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 18796, 18802 (2003) (“Verizon First Section 272 Audit NAL”) (“Although the identified errors may represent a small fraction of Verizon’s total postings, they represent a large percentage of the transactions sampled. And even if the errors were “clerical,” they nevertheless constitute a failure to comply with our rules. Therefore, we find that Verizon violated section 272(b)(5) of the Act and section 53.203(e) of the Commission’s rules”).

⁹³ Attachment A-4 at 6. Not all were effective on the first day of the month, *see id.* Item 30.

⁹⁴ *Id.*, Lines 8, 15, 20, 32; Attachment A-4, Lines 21, 23.

⁹⁵ Attachment A-3, Line 8, Attachment A-4 Line 25. *See also*, Qwest’s Response, Appendix C, Attachment 1 at 3, Issue No. 13 (Post-271). The same would be true for “QC provided order management and billing inquiry functions to QCC,” Qwest’s Response, Appendix C, Attachment 1 at 1, Issue No. 14 (Pre-271) and Attachment A-4, Line 7, or “[p]roject management functions added to posted agreement,” Qwest’s Response, Appendix C, Attachment 1 at 2, Issue No. 22 (Pre-271) and Attachment A-4, Line 7.

as to the other changes to terms and conditions is incorrect. The web postings must fully and correctly describe the rates, terms and conditions of the transactions. *Accounting Safeguards Order*, 11 FCC Rcd. at 17593-94.

There were additional explanations for four violations. For three violations, Qwest contested the correctness of the date identified as the date the agreement was effective or was posted, but provided no basis for their belief that the dates entered in the ordinary course of business were incorrect.⁹⁶ As to the fourth violation, Qwest argued that posting late, but before services were actually provisioned, is not a violation.⁹⁷ But that is not what the rules require – the posting must be made on the Internet within 10 days *of the transaction*. *Accounting Safeguards Order*, 11 FCC Rcd. at 17593-94.

C. Other Potential Violations of the Affiliate Transaction Rules

1. Switch Transferred By The BOC To The Section 272 Affiliate.

In apparent violation of the “arms length” requirement, the Auditor reported that the Qwest BOC purchased a switch from a third party and then transferred it to QCC at the Qwest BOC purchase price, without making this available to unaffiliated entities.⁹⁸ Qwest’s explanation – that it was the third party vendor that insisted on the transfer to QCC rather than to another IXC⁹⁹ – seems implausible since the third party vendor, particularly in the current telecommunications

⁹⁶ Attachment A-4, Lines 5, 7, 12.

⁹⁷ Attachment A-4, Line 28.

⁹⁸ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 8 at 21.

⁹⁹ Qwest represented that “QC had a minimum volume purchase obligation with the third party vendor. QC’s capital plans did not require the amount of equipment needed to meet the commitment by the established due date. However, QCC needed the type of equipment covered by the contract. The Qwest BOC represented that third party vendor agreed to reduce the QC purchase commitment if QC purchased the equipment and then sold it to QCC,” which it did. *Id.*

equipment market, ought to be indifferent as to whom the BOC resold the switch so long as it was paid. Indeed, the third party vendor generally does not have the right to dictate to whom equipment purchased from it could thereafter be resold.

2. Improper Valuation Of Services Provided By The Section 272 Affiliate To The BOC.

(i) *Potentially improper calculation of “Prevailing Company Price:”* To ensure that the BOC complies with the obligation in section 272(b)(5) that all affiliate transactions occur at arm’s length, the BOC must abide by the Commission’s affiliate transaction rules. 47 C.F.R. § 32.27; *Accounting Safeguards Order*, 11 FCC Rcd at 17620, ¶ 176. Those rules require BOCs to report transactions between regulated and non-regulated affiliates, and to value the cost of affiliate transactions generally in accordance with one of two valuation techniques – either Fully Distributed Cost (“FDC”) or Fair Market Value (“FMV”). Prevailing Company Price (“PCP”) may be charged where sales of a particular service to third parties encompass more than 25% of the total quantity of that service sold by the selling entity.

Qwest, in determining the PCP its section 272 affiliate charged the BOC in situations where the section 272 affiliate provided the same service out-of-region to third parties that was provided in-region to the BOC, used the out-of-region price as the PCP if it satisfied the 25% threshold.¹⁰⁰ To the extent that the out-of-region PCP was higher than the in-region PCP, the difference between the two constituted an unlawful subsidy from the BOC to the section 272 affiliate.

(ii) *Failure to adequately explain why certain charges did not agree with the PCP price posted in the affiliate agreement:* The Auditor separately found that for 13% of the

¹⁰⁰ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 7 at 20.

sampled bill records (13/100) the basic rate charged by the section 272 affiliate did not agree with the PCP price posted in the affiliate agreement and for approximately half, the section 272 affiliate agreement had a better rate.¹⁰¹ The explanation given is that this is due to rounding with a further description “of how rounding could occur” but nowhere is it determined whether, and if so, to what extent, any one or more of the rounding issues explained the differential.¹⁰²

D. Qwest’s Programs For Training Employees To Comply With The Affiliate Transaction Rules Are Clearly Ineffective

As a threshold matter, here, as with the performance metrics (where the Auditor uncritically adopted the parity calculations made by Qwest) the objectivity and independence of the Auditor, is highly suspect. The Auditor, in this “Agreed Upon Procedures” (“AUP”) audit, opined that Qwest’s internal controls were adequate for complying with the affiliate transaction rules despite clear evidence to the contrary. Thus, the Auditor reported that the Code of Conduct “provides framework and resources to help employees make the *right* legal and ethical choices.”¹⁰³ It obviously did not, since the employees often made the wrong legal and ethical choices, both as to web-postings and call center referrals. The Auditor further reported that it interviewed 14 employees¹⁰⁴ (although the *General Standard Procedures* required that *all* “employees responsible for the development and recording of affiliate transactions costs in the

¹⁰¹ Attachment A-6, lines 3, 8, 10-13.

¹⁰² Qwest Audit Report, Appendix A, Objective V/VI, Procedure 7 at 20. The Auditor also noted that payment for five of 100 sampled bill records were made five months or more after the invoice date. *Id.* at 21. The Auditor did not further determine whether this constituted a preference in favor of the section 272 affiliate.

¹⁰³ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 13 (emphasis added).

¹⁰⁴ Five from the Regulatory Finance and Regulatory Accounting groups and nine employees of QSC. *Id.* at 15.

books or record of the carrier” be interviewed)¹⁰⁵ and that “these employees were aware of and demonstrated knowledge of the Section 272 requirements and affiliate transaction rules.”¹⁰⁶ Yet the data in the Audit Report incontrovertibly demonstrates, and Qwest itself concedes, that its training materials were inadequate, and that its employees neither were aware, nor understood, the section 272 requirements and affiliate transaction rules. Indeed, because the evidence of poor training was so overwhelming, Qwest has proposed substantial, although still inadequate revisions in light of the significant and persistent evidence of web posting and call center section 272 violations.¹⁰⁷

Thus, the Auditor reported that Qwest holds “Regulatory Account/Business Unit Affiliate Managers (“BUAM”) monthly meetings [that] focus on new issues relating to Section 272 compliance requirements and the Accounting Safeguards Order.”¹⁰⁸ Yet in response to the evidence of persistent and material web posting violations, Qwest stated that it had to conduct “additional training” of the BUAMs “emphasizing the 10 day posting requirement.”¹⁰⁹

Similarly, the “All Employee Section 272 Compliance Training ... provided on Qwest’s corporate-wide internal website”¹¹⁰ was concededly inadequate to avoid the web posting violations. Thus, the Vice President of Corporate Compliance, after the audit, had to send out an “all employee” memo “addressing section 272 compliance with particular attention and focus on

¹⁰⁵ *General Standard Procedures* at 36.

¹⁰⁶ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 15.

¹⁰⁷ See Qwest’s Response to the Auditor’s Report, Appendix C at 4-5 and 6-11.

¹⁰⁸ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 15.

¹⁰⁹ Qwest’s Response to the Auditor’s Report, Appendix C at 4.

¹¹⁰ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 13.

the 10 day posting requirement,” and “[a] supplemental training package is being posted on the Qwest intranet which references the section 272 posting requirements and links to the process flows for requesting section 272 training.”¹¹¹ The other training programs, including the “Customized Section 272 Training for Qwest BOC and QSC Network Department Leaders ... provided periodically,” the “Wholesale Employee Training”¹¹² and the FCC/Regulatory Compliance Managers Training Sessions held on an “as needed” basis, were similarly concededly inadequate as Qwest now asserts that “[a]dditional training sessions with key personnel that address the section 272 posting requirements are also occurring beginning in June 2004.” The vague assurances of “updated,” “supplemental” or “[a]dditional” training, in light of Qwest’s past failures, give little assurance that any of this will be effective.

Qwest’s “Methods for Affiliate Transactions” manual provided online on Qwest’s internal website “which includes Section 272 specific instructions for employees involved in affiliate transactions,”¹¹³ was similarly concededly inadequate as Qwest indicates that “[t]he methods and procedures to handle affiliate agreements are being refined and strengthened with the design of increasing compliance with regulatory requirements including the section 272 posting requirements ... scheduled to be placed on Qwest’s intranet by the end of June 2004.”¹¹⁴

Finally, the Auditor refers to other material on the Qwest Intranet, including the Corporate Compliance Code of Conduct Employees Booklet and the Legal Website/Internal Section 272

¹¹¹ Qwest’s Response to the Auditor’s Report, Appendix C at 4.

¹¹² Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 14-15.

¹¹³ *Id.* at 15.

¹¹⁴ Qwest’s Response to the Auditor’s Report, Appendix C at 4.

website which includes a link to the Internal 272 Compliance page.¹¹⁵ Yet, Qwest conceded that these resources were similarly inadequate, stating that “[t]he Qwest Section 272 Compliance resource document will be posted on the Qwest intranet by the end of June 2004. This document is a comprehensive discussion of section 272 requirements and will link to the process flows for requesting section 272 services to help ensure timely posting of agreements.”¹¹⁶ Presumably, the prior material was also “comprehensive,” yet was clearly inadequate. Certainly, more assurances should be provided by Qwest.

These online resources have been ineffective to date (they have either not been accessed, not understood, or not implemented). It is unclear how additional internal postings will be effective unless employees are required to access them and supervisory employees are required to ensure that the material posted is both understood and implemented.

III. NO DETERMINATION CAN BE MADE AS TO QWEST'S COMPLIANCE WITH THE STRUCTURAL SAFEGUARDS

A. Qwest's Larger Accounting Problems Preclude Any Finding That Qwest Has Complied With Some Of The Structural Requirements Of Section 272.

As a result of Qwest's ongoing accounting problems,¹¹⁷ no conclusions can be drawn as to whether there has been compliance with the section 272(b)(1) requirement that the BOC and section 272 affiliate not jointly own switching and transmission equipment or the land and

¹¹⁵ Qwest Audit Report, Appendix A, Objective V/VI, Procedure 3 at 13-14.

¹¹⁶ Qwest's Response to the Auditor's Report, Appendix C at 4.

¹¹⁷ The Qwest Communications International Inc. (“QCII”) financial statement restatements for 2001 and 2002 were not released until October 31, 2003, and the financial statements for the engagement period (2003) were “in process as of the date of this draft report” and it does not appear that they had been completed when the Audit Report was filed herein. Objective II, Procedure 4 at 7; see also, Objective I, Procedure 5 at 4 and Qwest's Response, Appendix C at 1.

buildings housing such facilities,¹¹⁸ or the section 272(b)(2) requirement that the affiliate must maintain its books, records, and accounts in accordance with Generally Accepted Accounting Principles (GAAP).¹¹⁹ Specifically:

(1) Section 272(b)(1) bars the BOC and section 272 affiliate from jointly owning switching and transmission equipment or the land and buildings housing such facilities. *See Non-Accounting Safeguards Order* 11 FCC Rcd at 7615 (¶ 163). The Trial Balance for QCC included various items not included in the Fixed Asset Listing, including restatement and impairment credits in excess of \$6.5 billion. Moreover, for 6% of the sampled transmission and switching assets on the QCC Asset Listing there was no documentation to indicate that QCC (or QLDC) owned those assets. Thus, no conclusion can be drawn from the Auditor's Report as to whether or not the BOC and section 272 affiliate jointly owned switching and transmission equipment or the land and buildings housing such facilities.

(2) Section 272(b)(2) requires that the affiliate maintain its books, records, and accounts in accordance with GAAP. *Accounting Safeguards Order*, 11 FCC Rcd at 17617-17618 (¶¶ 168-170). The Auditor reported that the 2003 financial statements were "in process" and so had to rely on management's representations that "they were not aware of any non-compliance with GAAP."¹²⁰ But this negative assertion is not sufficient to find compliance. Indeed, the Auditor separately found that an IRU where "QCC was the lessee or purchaser" (for

¹¹⁸ 47 U.S.C. § 272(b)(1) (requires the interLATA affiliate to "operate independently from the Bell Operating Company").

¹¹⁹ 47 U.S.C. § 272(b)(2) (requires an interLATA affiliate to "maintain books, records, and accounts in the manner prescribed by the Commission that are separate from the books, records, and accounts maintained by the Bell Operating Company of which it is an affiliate").

¹²⁰ Qwest Audit Report, Appendix A, Objective II, Procedure 4 at 7.

accounting purposes a critical distinction)¹²¹ was not maintained in accordance with GAAP. This related to a subagreement involving “an additional product added to the lease that qualified for capitalization since the length of the additional product equaled the economic life of the asset leased” where “during the Audit Test Period, QCC did not record amortization entries to reduce the deferred asset established when this lease was capitalized, as required by GAAP.”¹²² Qwest claims “inadvertence.”¹²³ There was also a problem with a second subagreement to this IRU involving a monthly recurring charge where there was a difference of almost \$234,000 between the amount invoiced to, and paid by QCC, and the higher amount QCC recorded as an expense.¹²⁴ As to this non-compliance with GAAP, Qwest argues non-materiality.¹²⁵ In light of Qwest’s prior accounting problems with respect to IRUs,¹²⁶ its claim of inadvertence rings

¹²¹ FASB Concept Statement 5 ¶¶ 83-84; *see also*, SEC’s Staff Accounting Bulletin (SAB) 101, <http://www.sec.gov/interp/account.shtml> (as a lease revenues are recognized over the life of the contract; as a purchase revenues would be recognized “up front”).

¹²² Qwest Audit Report, Appendix A, Objective II, Procedure 2 at 7.

¹²³ *Id.*

¹²⁴ *Id.* (“[t]he total amount invoiced to QCC and paid by QCC was \$614,675 compared to the amount QCC recorded as expense of \$848,600”). There was also a difference of \$3,190 between the monthly recurring charges invoiced to QCC in September 2003 and the monthly recurring charges listed in the lease agreement.” *Id.*

¹²⁵ Qwest Response, Appendix C at 2.

¹²⁶ *In the Matter of the Merger of Qwest Communications International, Inc.*, EB-02-1H-0674 (rel. May 7, 2003); *see also*, “Qwest Communications Provides Current Status of Ongoing Analysis of its Accounting Policies and Practices,” July 28, 2002, www.qwest.com/about/media/pressroom, Qwest disclosed that it had “in some cases applied its accounting policies incorrectly with respect to IRUs it tried to characterize as asset sale transactions in 1999, 2000 and 2001.” *Id.* at 1. Qwest admitted that, in some instances, the “optical capacity asset sales” should have been “instead treated as operating leases or services contracts.” *Id.* at 2.

hollow. Materiality turns on what other violations are identified once the corrected 2003 financial statements are reviewed by the Auditor.

B. The Auditor Performed An Inadequate Evaluation Of Compliance With Other Structural Safeguards

1. The “OI&M” Requirement

The operations, installation and management (“OI&M”) requirement¹²⁷ analysis was inadequate. The Auditor reported only that the “Qwest BOC” and the “Section 272 affiliates” represented that each “did not perform the above-described OI&M services on facilities either owned” by the other, “or leased from a third party” by the other.¹²⁸ A more detailed description of OI&M provisioning should have been provided.¹²⁹

¹²⁷ Section 272(b)(1) requires the interLATA affiliate to “operate independently from the Bell Operating Company.” 47 U.S.C. § 272(b)(1). At the time of the audit, this requirement encompassed the obligations that neither the BOC nor the affiliate provides OI&M services to the other. See *Non-Accounting Safeguards Order* ¶ 163. While the Commission eliminated this requirement in Report and Order, *In the Matter of Section 272(b)(1)’s “Operate Independently” Requirement for Section 272 Affiliates*, WC Docket No. 03-228, 19 FCC Rcd. 5102 (rel. March 17, 2004), it was in effect during the engagement period.

¹²⁸ Qwest Audit Report, Appendix A, Objective I, Procedure 3 at 4.

¹²⁹ Cf., Report of PricewaterhouseCoopers LLP, (Dec. 23, 2003) (“BellSouth Audit Report”), Objective 1, Procedures 3 and 4 at Appendix A, pp. 1-2; Reports of Independent Accountants on Applying Agreed-Upon Procedures, prepared by Ernst & Young, LLP (Dec. 17, 2001) (“SBC’s First Audit Report”), Attachment A-2; and Reports of Independent Accountants on Applying Agreed-Upon Procedures, prepared by PricewaterhouseCoopers LLP filed on Feb. 6, 2002 (“Verizon’s First Audit Report”), Objective I, Procedure 4, at Appendix A, p. 4. While Qwest used resale arrangements for providing interLATA long distance service through October 2003 and accordingly “incurs very few OI&M costs” up to that point, Petition of Qwest Services Corp. for Forbearance From the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Sections 53.203(a)(2)-(3) of the Commission’s Rules, CC Docket No. 96-149 (Oct. 3, 2003) at 7, nonetheless some OI&M costs were incurred; moreover OI&M costs presumably increased once QCII filed its restated financial statements and QCC provided in-region interLATA services beginning in November 2003, Objective II, Procedure 6, Qwest Audit Report at 8.

2. The “No Recourse” Requirement

When the Auditor, in determining compliance with section 272(b)(4)’s requirement that an interLATA affiliate “may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company,”¹³⁰ sought confirmations from lessors of no recourse to the assets of the BOC as required by the *General Standard Procedures*, only a quarter of the lessors (23/80) positively confirmed no recourse; “seven replies were received in which the lessor refused to provide a confirmation or requested additional information.”¹³¹ This is clearly an inadequate response from which to conclude that there has been sufficient compliance.

IV. THE PENALTIES IMPOSED MUST BE SUFFICIENT TO BOTH PUNISH PAST VIOLATIONS AND DETER FUTURE VIOLATIONS

Given Qwest’s violations, the Commission should impose meaningful penalties both to punish past violations and to deter future violations. The Commission’s experience with Verizon’s section 272 compliance is instructive. There, the Commission imposed a nominal penalty of less than \$283,000 for Verizon’s web posting and other violations identified in its first section 272 biennial audit.¹³² With Verizon apparently undeterred, those web violations continued, and the Commission again imposed a nominal penalty (\$300,000) for web posting violations identified in the second section 272 audit as well as other violations similar to those disclosed here – e.g., preferential treatment of the 272 affiliate and customer steering.¹³³ The Commission clearly

¹³⁰ 47 U.S.C. § 272(b)(4); 47 C.F.R. § 53.203(d).

¹³¹ Qwest Audit Report, Objective IV, Procedure 3 at 10.

¹³² Verizon First Section 272 Audit NAL.

¹³³ *Verizon Telephone Companies, Inc.*, Consent Decree, File No. EB-03-IH –0245 and 0550 (July 27, 2004).

must do more here if it has any interest in deterring material violations of the section 272 requirements.

CONCLUSION

For the reasons stated, the Commission should penalize Qwest for its patent violations of section 272, and require re-audit of those items where insufficient inquiry was made by the Auditor.

Respectfully submitted,

/s/ Aryeh S. Friedman

Leonard J. Cali
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August 30, 2004

Attachment 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(d) Biennial Audit of Qwest)	EB Docket No. 03-198
Communications International, Inc.)	
)	

**DECLARATION OF ROBERT M. BELL
ON BEHALF OF AT&T CORP.**

1. My name is Robert M. Bell. My business address is AT&T Labs-Research, 180 Park Avenue, Florham Park, New Jersey 07932.

2. I received a Ph.D. in Statistics from Stanford University in 1980. From 1980 to 1998, I was a statistician (from 1991-1998 Senior Statistician) at RAND, a non-profit institution that conducts public policy analysis. While at RAND, I supervised the statistical design and/or analysis of many projects, including several large multi-site evaluations. I also headed the RAND Statistics Group from 1993 to 1995 and taught statistics in the RAND Graduate School from 1992 to 1998. In 1998, I joined the Statistics Research Department at AT&T Labs-Research, where I am a Senior Technical Specialist. My main research area is survey research methods. I have authored or co-authored fifty articles on data analysis methods and applications that have appeared in a variety of refereed, professional journals. I am a fellow of the American Statistical Association. I am currently a member of the board of trustees of the National Institute of Statistical Sciences, a member of the Committee on National Statistics organized by the National Academies, and chair of the National Academies' Panel on Coverage

Evaluation and Correlation Bias in the 2010 Census. I have attached a copy of my curriculum vitae as Exhibit RMB-1.

3. I submitted Declarations in the first Verizon Section 272 Audit proceeding, CC Docket No. 96-150, on April 8, 2002; the first SBC Audit proceeding, CC Docket No. 96-150, on January 29, 2002; the second Verizon Section 272 Audit proceeding, EB Docket No. 03-200, on February 10, 2004; the BellSouth Section 272 Audit proceeding, EB Docket No. 03-197, on March 9, 2004, and the second SBC Section 272 Audit, EB Docket No. 03-199 on March 26, 2004.

4. The purpose of this declaration is to address the data on performance measurements in Attachments A-10 and A-11 to the Report of Ernst & Young LLP (the “Auditor”), filed on June 10, 2004 in connection with the biennial section 272 audit of the Qwest companies (“Auditor’s Report”).

I. PROBLEMS WITH THE PARITY CALCULATON.

5. The tables in Attachment A-10 of the Auditor’s Report include columns showing “parity scores” intended to summarize statistical comparisons of performance results for non-affiliates with those of either “BOC & Other Affiliates” or the “Section 272 Affiliate.” As stated in the Auditor’s Report at 37, “[a] negative parity score means the result is not statistically significant while a parity score greater than or equal to zero indicates the difference ... is statistically significant.” Based on the formula in footnote 28, the parity score is greater than or equal to zero (indicating statistical significance) if and only if the z score is greater than or equal to the critical z value. The footnote does not directly state what value is used for the critical z value, but continues, “The critical_z value is 1.645 for a 95% confidence level,” seeming to

imply that the parity scores correspond to a 95% confidence level or, equivalently, to $\alpha=0.05$ for statistical tests.

6. It appears that the parity scores were all provided by Qwest, with no validation by the Auditor, “Qwest represented that all applicable parity scores were provided and are included on Attachment A-10,” Auditor’s Report at 37. However, Qwest’s own documentation for its parity scores¹ is contradictory about the value used for the critical z value. While page 4 of that document suggests that the critical z value z^* varies by state, footnote 4 on page 5 definitively states, “Qwest uses a z^* that sets $\alpha=.05$ for one test, or $z^* = 1.645$. This corresponds to a 95% level of confidence.”

7. However, the tabled parity scores for proportions miss many instances of statistically significant disparities. There are two reasons: cases where parity scores are not computed at all and cases where they are computed incorrectly, assuming a 95% confidence level.

8. For % PIC change requests processed within 24 hours (metric PC-1A), the tables in Attachment A-10 inexplicably exclude parity scores for rows where the corresponding affiliate percentage is 100.00%.² For example, consider the results for January 2003 in Wyoming (Attachment A-10m, page 1 of 3). For the Section 272 affiliate, there were zero failures out of 3,159 transactions. In contrast six failures occurred for non-affiliates even though there were fewer non-affiliate transactions ($n=2,572$). This finding is very unlikely to have

¹ “Regulatory Reporting, 272 Service Performance Measurements, 272 Statistical Methodology,” 8 January 2004, attachment to *ex parte* letter from Cronan O’Connell, Qwest, to Marlene Dortch, FCC, CC Docket Nos. 96-149, 01-321, WC Docket No. 02-112 and EB Docket No. 03-197 (May 20, 2004) (“Qwest’s May 20 *ex parte*”).

occurred by chance in the presence of parity service, as evidenced by a P-value of 0.0081 for Fisher's exact test (computed in Proc Freq of SAS, Release 8.2). Similarly, for February and May, Fisher's exact test produces P-values of 0.0111 and 0.0079, respectively, both far below 0.05. However, no parity scores are even reported for any of those months, hiding the statistical evidence in favor of discrimination.

9. Even where parity scores are tabled, they misrepresent the statistical significance of the differences. For example, consider metric PC-1A for June 2003 in North Dakota (Attachment A-10h, page 2 of 3). There were 12 misses out of 1,170 transactions for non-affiliates compared with only 7 misses out of 2,160 transactions for the Section 272 affiliate. The P-value from Fisher's exact test for this comparison is 0.0116, so that the difference is easily significant at the 0.05 level (or, equivalently, at the 95% confidence level). Yet, the tabled parity score is -0.08, which would imply a lack of statistical significance.

II. THE PERFORMANCE MEASUREMENT DATA SHOWS THAT BELLSOUTH HAS DISCRIMINATED IN FAVOR OF ITS SECTION 272 AFFILIATE.

10. **% PIC Change Requests Processed Within 24 Hours.** For % PIC change requests processed within 24 hours (metric PC-1A), there were nine or more months of data reported for both non-affiliates and Section 272 affiliates in most states, allowing sufficient information to look for patterns of discriminatory service performance. In both Wyoming and North Dakota, there was a strong, statistically significant pattern of poorer performance for non-affiliates than for Section 272 affiliates. Non-affiliates faced higher proportions of misses in

² In contrast, parity scores are included for other metrics when one, but not both, percentage equals 100.00%. If anything, it would be easier to justify excluding parity scores for these other metrics, which all involve lower volumes than PC-1A.

almost every month, and aggregate results showed that the overall differences were statistically significant.

11. In Wyoming, lower percentages of PIC change requests were processed within 24 hours for non-affiliates in 11 of 12 months. Although the parity scores only indicated statistical significance for three months (April, June, and July), the differences were also statistically significant at the 0.05 level for January, February, and May (no parity score reported) and for August (incorrect parity score)—for a total of seven months with statistically significant evidence of discrimination. Across all 12 months, the proportion of misses (requests not processed within 24 hours) was four times higher for non-affiliates (Fisher exact P-value < 0.0001).

12. In North Dakota, lower percentages of non-affiliate requests were processed within 24 hours in 10 of 12 months. Based on Fisher's exact test, the differences were statistically significant at the 0.05 level in April (P=0.0361) and June (P=0.0116). Aggregated across all 12 months, 0.54% of non affiliate requests were missed compared with 0.34% for Section 272 affiliates (P=0.0033).

13. The pattern of more non-affiliate requests taking longer than 24 hours held up in the other 11 states as well. Across those 11 states, non-affiliates fared worse in 65 months, compared with 44 months where they fared better. Twenty one of the differences favoring the Section 272 affiliate were statistically significant at the 0.05 level, based on Fisher's exact test, with most of those significant at the 0.001 level (see Table 1).

Table 1

Statistically Significant Disparities Favoring the Section 272 Affiliate
for Measure PC-1A (Excluding Wyoming and North Dakota)

State	Month	P-value
Colorado	Jan	<.0001
Colorado	Feb	.0324
Idaho	Jan	<.0001
Idaho	Mar	.0004
Idaho	Jul	.0328
Iowa	Jan	.0009
Minnesota	Jul	<.0001
Minnesota	Dec	.0425
Nebraska	Jan	<.0001
Nebraska	Feb	<.0001
New Mexico	Dec	<.0001
Oregon	Jun	.0275
Oregon	Aug	.0139
Oregon	Dec	<.0001
Utah	Jan	<.0001
Utah	Feb	.0192
Utah	Jun	.0266
Washington	Mar	.0048
Washington	May	.0015
Washington	Jul	.0005
Washington	Aug	.0010

14. **Limitations of Data for Other Metrics.** It is much harder to evaluate differences for each of the other six performance measures because only two months of data are available for any state/product combination and volumes are generally much smaller than for PIC change requests. In particular, there are not enough months for the types of state specific analyses reported above for PIC changes, which showed patterns of discriminatory performance in both Wyoming and North Dakota.

15. In addition, it is impossible to validate the parity scores reported for the two interval measures (Average Installation Interval and Mean Time to Restore). Standard errors and confidence intervals are not reported for either individual means or for the tabulated

differences. Nor are standard deviations reported, which would allow computation of standard errors. In light of the problems described above with the parity scores for PIC Change, the parity scores for the two interval measures cannot be trusted without validation. Consequently, there may be additional instances of statistically significant disparities not identified as such in the tables.

16. **Average Installation Interval.** Despite the limited information collected and reported for Average Installation Interval (OP-4), the pattern of results across the region provides substantial evidence of longer intervals for non-affiliated carriers than for the Section 272 affiliate for each of DS0, DS1, and DS3.

17. Out of 26 comparisons reported across the region for DS1 (November and December for each state), the non-affiliate average was higher 23 times (lower only 3 times). About one half of those disparities favored the Section 272 affiliate by five or more days. A Wilcoxon signed rank test for whether the differences are centered at zero was rejected, with one tailed P-value < 0.0001 (Proc Univariate, SAS Release 8.2).

18. Of 15 comparisons for DS0 (using all the comparisons that were shown), 12 favored non-affiliates (Wilcoxon P-value = 0.0214). Of 13 comparisons for DS3, 10 favored non-affiliates (Wilcoxon P-value = 0.0301).

19. **Mean Time to Restore.** Compared with BOC & other affiliates, mean time to restore (MR-6) was typically higher for non-affiliates.³ In five of seven states with data for “BOC & Other Affiliates,” non-affiliate restoration times were longer for both months. Based on the parity scores, these disparities were statistically significant for both months in Iowa

³ Maintenance and repair volume for the Section 272 affiliate was typically very small or zero for DS0, making comparisons with BOC & other affiliates more appropriate.

and Nebraska and for November in North Dakota. In 7 of 14 comparisons, the mean time for non-affiliates was at least double that for BOC & other affiliates.

Robert M. Bell
Robert M. Bell

Dated: this 32nd day of August, 2004

Exhibit RMB-1

ROBERT M. BELL

EDUCATION

Ph.D., Statistics, 1980, Stanford University
M.S., Statistics, 1973, University of Chicago
B.S., Mathematics, 1972, Harvey Mudd College

PROFESSIONAL EXPERIENCE

1998-Present – Senior Technical Specialist, Statistics Research Department, AT&T Labs
- Research, Florham Park, NJ; 2003 AT&T Science and Technology Medal
1991-1999 -- Senior Statistician, RAND, Santa Monica, California; Head, RAND
Statistics Group (1993-1995); Member, RAND Graduate School Faculty (1991-1998)
1988-1991 -- Statistician, Social Policy Department, RAND, Santa Monica, California
1980-1988 -- Associate Statistician, Economics and Statistics Department, RAND, Santa
Monica, California
1975-1979 -- Teaching Assistant/Research Assistant, Department of Statistics, Stanford
University
1973-1975 -- Consultant and Mathematical Assistant, Economics Department, The
RAND Corporation, (also intermittently during educational leave)

RESEARCH AREAS

Experimental Design and Survey Development. Dr. Bell supervised statistical design of Project Alert, an experiment of drug abuse prevention in thirty California and Oregon junior high schools. This work has involved data collection and analysis for sample selection/assignment, development of a series of 30 page questionnaires, and design of sampling procedures for several secondary analyses.

Data Analysis. Dr. Bell supervised the main data analysis in Project ALERT. He previously supervised analysis of clinical data from the National Preventive Dentistry Demonstration Program, a study of school-based preventive treatments. Data from that study included one to five annual examinations of 30,000 children in 10 communities, over 10,000 replicate examinations, and 20,000 surveys.

Statistical Methodology. Dr. Bell's methodological interests include survey research methods, analysis of data from complex samples, record linkage methods, analysis of missing data, measurement and scaling, robust procedures, empirical Bayes estimation, and sample reuse methods.

PROFESSIONAL ORGANIZATIONS/HONORS

Chair, Panel on Coverage Evaluation and Correlation Bias in the 2010 Census, National Academies, 2004-present
Member, board of trustees, National Institute of Statistical Sciences, 2004-present
Member, Committee on National Statistics, National Academy of Sciences, 2001-present.
Chair, Committee to Review the 2000 Decade Design of the Scientists and Engineers Statistical Data System (SESTAT), National Academies, 2002.
Member, Panel to Review the 2000 Census, National Academies, 1998-2004.
Fellow, American Statistical Association, 1998.
Chair, American Statistical Association Subcommittee, Census Advisory Committee of Professional Associations, 1997-1998; Member, 1995-2000.
Member, Panel on Alternative Census Methodologies, National Academy of Sciences, 1995-1999.
Member, Committee on Minorities in Statistics, American Statistical Association, 1995-2000.
Member, Panel to Evaluate Alternative Census Methods, National Academy of Sciences, 1992-1994.
Visiting Lecturer for American Statistical Association, 1984-1986.
Program Chairman, Applied Statistics Workshop, Southern California Section of American Statistical Association, 1984.
Institute of Mathematical Statistics, since 1979.
American Statistical Association, since 1974.

PUBLICATIONS

Published Articles

“Bias Reduction in Standard Errors for Linear Regression with Multi-Stage Samples,” *Survey Methodology*, Vol. 28, 2002, 169-181 (Bell and McCaffrey).

“School-Based Drug Prevention: Challenges in Designing and Analyzing Social Experiments,” in *Public Policy and Statistics: Case Studies from RAND*, eds. S.C. Morton and J.E. Rolph, Springer-Verlag, New York, 2000.

“Appropriateness of the Decision to Transfer Nursing Facility Residents to the Hospital,” *Journal of the American Geriatric Society*, Vol. 48, 2000, 154-163 (Saliba, Kington, Buchanan, Bell, et al.).

“A Clinically Detailed Risk Information System for Cost,” *Health Care Financing Review*, Vol. 21, 2000, 1-27 (Carter, Bell, Dubois, Goldberg, Keeler, McAlearney, Post, and Rumpel).

“Cross-Lagged Relationships among Adolescent Problem Drug Use, Delinquent Behavior, and Emotional Distress,” *Journal of Drug Issues*, Vol., 30, 2000, 283-304 (Bui, Ellickson, and Bell).

“Adolescent Use of Illicit Drugs Other Than Marijuana: How Important is Social Bonding and for Which Ethnic Groups?” *Substance Use and Misuse*, Vol. 34, 1999, 317-346 (Ellickson, Collins, and Bell).

“Simultaneous Polydrug Use among Teens: Prevalence and Predictors,” *Journal of Substance Use*, Vol. 10, 1999, 233-253 (Collins, Ellickson, and Bell).

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August 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2004, I caused true and correct copies of the forgoing Comments of AT&T Corp. on Qwest's Section 272 Compliance Biennial Audit Report to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: August 30, 2004

/s/ Karen Kotula

Karen Kotula

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